

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SEVENTH REGION**

**DETROIT EDISON COMPANY<sup>1</sup>**

**Employer**

**and**

**Case 7-RC-22919**

**LOCAL 8, INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, AFL-CIO<sup>2</sup>**

**Petitioner**

**and**

**LOCAL 223, UTILITY WORKERS UNION OF  
AMERICA (UWUA), AFL-CIO<sup>3</sup>**

**Intervenor**

**APPEARANCES:**

Adam Forman, Attorney, of Detroit, Michigan, for the Employer.  
Basil William Mangano, Attorney, of Toledo, Ohio, for the Petitioner.  
L. Rodger Webb, Attorney, of Detroit, Michigan for the Intervenor.

**DECISION AND REMAND**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

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<sup>1</sup> The Employer's name appears as amended at the hearing.

<sup>2</sup> The Petitioner's name appears as amended at the hearing.

<sup>3</sup> The Intervenor's name appears as amended at the hearing.

Upon the entire record <sup>4</sup> in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organizations involved claim to represent certain employees of the Employer.

## **Overview**

The Petitioner seeks to represent a unit of approximately 24 to 28 nuclear supervisory operators (NSOs) who are employed at the Employer's Fermi 2 nuclear power plant in Newport, Michigan. The Employer contends the petitioned-for employees are supervisors under the Act and thus the petition should be dismissed. The Intervenor, which represents other employees at the Employer's facilities, asserts that the petitioned-for unit is not appropriate and the petition should be dismissed.

There is no history of collective bargaining with respect to the unit sought by the Petitioner, and the Petitioner is not seeking to represent any other employees at the Employer's facilities.

On the supervisory issue, I find that the Employer has not satisfied its burden of proof that any of the NSOs are supervisors within the meaning of Section 2(11) of the Act. I also find that there is insufficient evidence in the record to determine if the NSOs are an appropriate separate unit, or if they share a community of interest with the represented employees at Fermi 2, or share a community of interest with other unrepresented employees at Fermi 2. Accordingly, I shall order that the case be remanded to obtain testimony on these issues.

## **Business Operations**

The Employer is a natural gas and electrical utility engaged in the production, transmission, storage, and distribution of natural gas and electricity to residential and commercial customers in communities located throughout Michigan. The Employer operates several energy producing facilities for the production of electricity, one of which is Fermi 2, the only nuclear plant in the company. Once electricity is produced, it flows

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<sup>4</sup> The parties filed briefs, which have been carefully considered. Counsel for the Intervenor requested and received a one-day extension to file its brief. All parties were notified of this extension.

into an integrated system of electrical transmission whereby the power produced by any of the plants is integrated into the Employer's power grid and can be distributed as needed in the system.

Fermi 2 is divided into five departments: Nuclear Production, Engineering, Projects, Assessment, and Support. The Nuclear Production department is further divided into five divisions: Nuclear Work Control, Maintenance, Radiation Protection, Outage Management, and Operations (where all the NSOs work). Fermi 2 has approximately 785 employees, 277 of whom are represented in a single unit by the Intervenor. Most of the represented employees are in the Nuclear Production department.

Kevin Hlavaty is the director of nuclear production; reporting to him is the manager of operations, Michael Phillippon. Under Phillippon are Greg Strobel, the operations engineer, and Kevin McMahon, general supervisor of operations support. There are nine shift managers,<sup>5</sup> who like the other supervisors and managers listed above, have direct supervision over NSOs. Shift managers report to either Strobel or McMahon. Although the parties were willing to stipulate that Phillippon, McMahon and the shift managers are supervisors under the Act, the parties were not willing to stipulate that Strobel is a supervisor. The Employer's human resources department operates outside of Fermi 2. However, Fermi 2 has its own dedicated human resources representative to handle all Fermi 2 issues.

Fermi 2 operates 24 hours a day on two 12-hour operating shifts. Operations classifies employees as being either "on-shift" or "off-shift." Strobel is responsible for everyone working on-shift. There are five rotating on-shift teams who work on a schedule of mixed day and night shifts, followed by four days of training. They work 12-hour shifts, 7 a.m. to 7 p.m. and 7 p.m. to 7 a.m. McMahon is responsible for staff who work off-shift. The off-shift employees are in rotation, covering vacations and other off days for the on-shift personnel. These off-shift teams, which are in training or completing other duties, are fully qualified and waiting for their rotation on-shift. They work 9 a.m. to 5 p.m.

Shift teams rotate together as a team. Each team is supervised by a shift manager, who is also a senior reactor operator (SRO). Under the shift manager is a control room supervisor (CRS) and a field support supervisor (FSS).<sup>6</sup> They also are known as assistant shift managers,<sup>7</sup> and are also SROs. Under the assistant managers are the 24 to 28 NSOs and 41 to 46 nuclear operators (NOs).

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<sup>5</sup> David Hemmele, Phil Skarbek, Mark Adams, Mark Kramer, Sue Reith, Greg Almes, Kirk Snyder, Patrick Lynch and Kevin McMahon. McMahon currently holds both the general supervisor and shift manager position.

<sup>6</sup> The position of FSS is also called shift technical advisor (STA) or shift engineer (SE). Engineers who are covering for a FSS are called this alternate title.

## NSOs

### *Licensure*

NSOs are required to pass the nuclear operator license examination and to maintain that license while an NSO. They are also required to have three years power plant experience, with at least one year at Fermi 2 and six months as an NO. In order to obtain a license, an employee selected to be an NSO is required to attend NSO training as prescribed by the NRC. Once the training is completed, and he or she passes the examination, the reactor operator (RO) license is received. Continuous training and a specific number of hours worked on-shift, as well as other requirements, are needed in order to maintain the license. NSOs also attend additional leadership and learning training that is not prescribed by the NRC. This additional training is to educate NSOs to be supervisors. Thus, ROs, by definition of the NRC, are not required to be supervisors.

### *Job Duties*

The on-shift team is focused around the operation of the main control room.<sup>8</sup> The control room consists of a kitchen, bathroom, conference room, shift manager's office, and AT control area. The AT control area contains panels with knobs, gauges, alarms, and computer equipment for the purpose of monitoring the facility and the nuclear reactor on a 24-hour basis. Four NSOs work on a shift team on the day shift, and three work at night and on weekends. Working in the control room is the CRS and two NSOs: the control room NSO (CRNSO) and the P603.

The CRNSO is assigned to operate and manipulate the controls on the panels in the control room. The CRNSO also provides oversight to four NOs who are each assigned to patrol, or do "rounds," for one of the four buildings at Fermi 2: the turbine, reactor, auxiliary, and radiation waste (rad waste) buildings. Essentially, the CRNSO controls the systems in the main control room, under the direction of the CRS and shift manager. These systems require adjustments that can be made directly on the panels. However, additional adjustments are sometimes required in the field and those adjustments are made by NOs. The P603 NSO also works in the control room and is primarily assigned to monitor and control the nuclear reactor.

The shift foreman, who works only on the day shift, is an NSO located in the work control area directly outside the control room. His assignment is to work in maintenance and surveillance. The patrol NSO takes on the assignments of the shift foreman NSO at

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<sup>7</sup> The Petitioner and Intervenor were not willing to stipulate that the assistant shift managers are supervisors under the Act. However, neither is seeking to represent these 15 individuals.

<sup>8</sup> There is another control room located in the Radiation Waste building. NOs, not NSOs, are staffed in this control room.

night and on the weekends. The shift foreman/patrol NSO oversees the work of two to five NOs who are assigned to support maintenance activities, such as hanging protective tags and conducting surveillance tests. When not performing as the shift foreman, the patrol NSO monitors equipment, maintenance and testing, and serves as the fire brigade leader. The fire brigade leader assigns tasks to the on-shift NOs related to drills or in response to a fire. Both the leaders and the NOs have had training sessions regarding drills and fire responses, and follow Employer procedures and fire plans.

The off-shift NSOs work in the operation work control, outage prep team, outage management operations, and operations support/procedures sections of the operations division. NSOs assigned to operation work control fill in as shift foreman on the Monday – Friday day shift every third week. The other two weeks, they review and prepare upcoming work activities. NSOs assigned to the outage prep team are principally involved in preparing work review (over an 18-month period) for upcoming fuel outages. They also fill in as shift foreman for vacation coverage. NSOs assigned to outage management operations review individual packages in preparation for outages. These NSOs also do vacation shift fill-in for the shift foreman position. Three off-shift NSOs do not rotate into on-shift positions. One NSO is permanently assigned to operations support procedures. Two other NSOs do not have active licenses<sup>9</sup>. Neither on-shift nor off-shift NSOs have any direct reports; i.e., employees reporting to them.

NSOs voluntarily serve on three-person hiring panels for the NO position and promotion panels for the NSO position. These panels interview, recommend, and rank candidates. One or two NSOs serve on these panels. Since the Employer hires and promotes only once every 18 months, few NSOs participate in this activity. In the past three plus years, only two current NSOs have participated on these hiring panels. Supervisors, such as Philippon, Strobel, McMahon, and shift managers, select the interview panel and also serve on them. Once selected, the NSO is involved in all activities of the panel. Human Resources (HR) provides the panel with a book of attributes and questions associated with those attributes. The panel as a group selects questions from the book. Any member of the panel is free to ask follow-up questions, which are not pre-approved by HR or scored by the panel. Once the interviews are completed, the panel as a group consensus, either recommends each candidate for the position or not. Once recommended, the candidates are ranked in comparison to the other recommended candidates. This list is given to Philippon. He has final authority for hiring NOs and promotion to NSO. He testified that he follows the recommendations and rankings of the panel 100% of the time.

NSOs wear a company-furnished uniform of Dockers pants and a sports style

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<sup>9</sup> No explanation was given for the fact that these NSOs do not have licenses. However, the assertion was made that once these individuals leave their positions, the positions will not be refilled.

shirt. Positions above NSO wear the same uniform, while NOs wears a pullover with jeans. All staff, including NSOs and NOs, fill out time cards by hand and submit them to the same person. No time clock is used. Both positions use the same locker room and break rooms.

### ***Pay and Benefits***

The job description of the NSO is published by the Employer in many different locations, such as job postings, conduct manuals, in expectations documents, and in training documents. A June 2004 job posting for the NSO position lists the position as an exempt salaried position, with a salary ranging between \$57,000 and \$86,000 a year; that is 12% above the base rate of an NO. The base rate for an NO according to the collective bargaining agreement as of June 5, 2006 will be \$22.04 per hour, with a range up to \$31.45 per hour. Based on a 40-hour week, that computes to approximately \$46,000 to \$65,000 a year. Licensed NSOs, as well as other licensed classifications, receive an \$8,000 license bonus per year. NOs do not have a license, and thus do not receive the bonus.

NSOs receive the same benefits as other unrepresented employees at Fermi 2, health insurance, and 401(k), with Employer contributions. NOs and other represented employees have benefits that are contractual and different. All employees also can receive a rewarding employee bonus (REP). NSOs and other unrepresented employees receive a percentage of their salary, while NOs receive a specific contractual amount. NSOs do not receive overtime pay (time and a half), while NOs do. However, NSOs receive straight time pay for any hours worked over 40 hours in a week.

### **NOs**

Working with NSOs on the shift teams are NOs, who all work outside the main control room. As already noted, the Intervenor represents the NOs at Fermi, as well as other classifications.<sup>10</sup> Their terms and conditions of employment are governed by a collective bargaining agreement. NOs are hourly employees. They have the same shifts and pay periods as NSOs.

NOs can be hired from within the company or off the street. An applicant applies for the position on the HR website. Generally, they are required to possess a high school diploma and a valid driver's license. Newly hired NOs participate in nine months of

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<sup>10</sup> The Intervenor represents over 4000 Edison and Michigan Consolidated Gas employees in 11 bargaining units, including 217 of the 785 employees employed at Fermi 2. In the operations department, the Intervenor represents all NOs, including the senior lead NO classification and the fire protection inspectors. Testimony established that unit employees also include the following classifications of employees in the nuclear support department: nuclear warehousemen, tool and equipment repairmen, motor fleet garage, and maintenance employees.

training. After this initial training, an NO is required to be qualified on the duties for doing rounds of the four buildings and other tasks. This training takes an additional six months. A training committee qualifies an NO for a task and issues a QUAL Card to indicate proficiency in that task. If at any point an NO fails in the proficiency of a task, he or she can be disqualified, and must be retrained to perform the task.

As described above, NOs do rounds of one of the four buildings. The CRNSO directs the activities of the four NOs who do rounds, with each NO assigned to a building. When an alarm sounds, the NSO directs the NO to manipulate gauges or dials in the building. The alarms are very specific in that they specify what building and what location in the building to respond to. Usually, the NOs are sent to respond to situations in the building to which they are assigned. Thus, the turbine NO is sent to an alarm in the turbine building and generally stays in that assigned area. A CRNSO may direct an NO working in another building or working as a miscellaneous NO to assist an NO in another building when multiple alarms occur or in other situations where more than one person is needed. This is accomplished in the context of detailed procedures, and the NSOs' directive to work as a team, under the direction of the CRS and shift manager. Additionally, the reactor building NO and the turbine building NO form the fire brigade, which works closely with the fire protection inspectors, who are also represented by the Intervenor. There is also a control room in the Rad Waste building which is operated by NOs.

NOs not assigned to do rounds are called miscellaneous NOs. They do tagging, shift routines, shift surveillances, refueling, FIRSTeam (Fermi Integrated Resources Support Team) support, and other miscellaneous NO work as prescribed by the Plan of the Day (POD). Tagging is a procedure to ensure that an item has the energy removed so that it can be worked on safely. Shift routines and shift surveillances are tasks that are performed daily, weekly, or monthly. They are routine by nature and can involve tasks such as inventory or inspections. Refueling is the process of changing the fuel in the nuclear reactor. During the refueling outage, which occurs every 18 months and lasts for 2-3 months, NOs are involved in many activities driven by the refueling schedule and the POD. FIRSTeam performs activities, usually repairs that do not require much resources, scheduling or planning. As with NSOs, much of what the NOs do is covered under a procedure requiring specific steps to be followed.

There are eight senior lead NOs,<sup>11</sup> a classification included in the bargaining unit. Senior lead NOs were created to have a “(u)nion represented employee assume the non-disciplinary responsibilities of a supervisor.” The senior leads receive 10% above the base rate of an NO. Senior leads perform special tasks, such as refuel outage

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<sup>11</sup> The position was formerly called the lead nuclear operator (LNO). It was created in 1998 and eliminated in 2000. A year and a half later, the senior lead position was created.

assignments. According to a 2002 Memorandum of Understanding between the Intervenor and the Employer, senior leads can lead turnover meetings, perform pre-job briefs, make crew assignments, and provide work direction.

## **Scheduling**

There was some testimony that NSOs can approve NOs to go on breaks or to leave work early. However, further testimony clarified that NOs usually determine their own breaks and, unless they are involved in an activity that requires an immediate replacement, they need not seek approval. In the event that an NO needs to have a replacement before leaving for break, such as during emergent or abnormal situations, the NSO finds someone to replace the NO and arranges the break time. As to letting NOs leave work early, the facility is currently operating at minimum capacity under NRC regulations; thus, staff may not leave early. In the past, however, NSOs sought the approval of the CRS or shift manager before letting an NO leave early.

## **Discipline**

NSOs can issue oral warnings known as coachings or transform the coaching to writing on observation forms that have no consequence or connection to awards, promotions, or evaluations. There was testimony that in 1998 or 1999, an NSO requested that an NO, who left work early without approval, not be paid for the day and be disciplined. However, the employee was not disciplined and the witness was not sure if the employee was paid for the day. Other examples of discipline introduced by the Employer only related to oral reprimands or coachings. In one instance, an NO talked to a shift manager after being coached about attendance by an NSO to see if this coaching was discipline. The shift manager advised the NO that the shift manager was the only person to hand out discipline.

Operations Manager Philippon testified that NSOs do not suspend or terminate employees, and verbal coachings and written observations have never led to discipline. The record disclosed that all instances of discipline issued from 2000 to the present were issued by individuals holding positions of shift manager or higher. Since 2003, only one NO has received a written reprimand and one has been terminated. Both actions were issued by shift managers.

## **Procedures and the Plan of the Day**

Much of what occurs in and out of the control room is governed by the NRC and step-by-step procedures mandated by the Employer. Day-to-day functions are described in the Manual Operating Procedures (MOP), the Operations Department Expectations, (ODE), Standard Operating Procedures (SOP), the Work Control Conduct Manual



(MWC), legal technical specifications, or the General Administration Contract Conduct Manual (MGA). If an alarm sounds, the shift manager, CRS, CRNSO, and/or the P603 follow the Alarm Response Procedure (ARP), the Emergency Operating Procedure (EOP), or the Abnormal Operating Procedure (AOP) in responding to the situation. There are roughly 1000 alarms on the panels in the main control room. The alarms are color coded: red, yellow, blue, and white. When an alarm sounds corresponding to one of the four buildings, the CRNSO usually sends the NO assigned to that building to respond to that alarm. When multiple alarms sound, the alarms are automatically prioritized based on the color code, red is the most important and white is informational.

Most procedures are “continuous use procedures,” which require that they be followed step-by-step, line-by-line. “Place keeping” forms are used to ensure that no step is missed. If a step is to be skipped, the NSO must collaborate with the CRS, and obtain the approval of the shift manager. A report is then made in the auto log. If a step is frequently skipped, or a step is frequently added, a corrective action or condition assessment resolution document (CARD) is submitted to the CARD ownership committee for review in an attempt to address the situation. In July 2005, MGA 03, a high level conduct manual, was changed to ensure that NSOs would no longer skip a step without authorization. Prior to July 2005, NSOs could skip a step in a procedure and write N/A next to it to indicate that it was skipped.

In addition to the procedures, expectations documents, and manuals used by NSOs each day, NSOs are required to follow a plan of the day (POD). The POD is a six-day plan of work assignments, the formulation of which is begun 13 or 17 weeks in advance. The POD is created outside the operations division by planners and schedulers. At some point, it is entered into the computer and shared with operations staff for all to see. It is updated by many layers of staff up to the day of implementation.

The POD lists all the activities that the Employer has decided should be accomplished during a given day. The POD is specific, in that it lists when the activity should occur, where it should occur, how many NSOs or NOs, as well as other staff, are required to complete the activity, the materials needed, and the time it should take to complete the activity. Some activities are listed as “no-slip,” meaning the Employer strongly intends it to be performed as scheduled. Of course, even with this specificity, activities are sometimes delayed due to other activities going on over time, alarms, and other unforeseen occurrences. Further, some activities require prior coordination or planning that is not described in the POD. The shift foreman is bestowed with the responsibility to ensure that the POD activities are completed. To that end, the shift foreman prioritizes and assigns tasks to the NOs, and provides guidance described as coaching to help them complete the tasks.

A shift turnover meeting is held at the beginning of the shift and is run by the shift manager. In attendance is the entire shift, including NSOs and NOs. The shift manager outlines the POD, reviews any problems on the prior shift, and selects three or four priorities for the day from the POD. Immediately after this meeting, the shift foreman meets with the NOs to assign tasks. He assigns tasks from the POD, as prioritized by the shift manager, as well as shift routines, tagging, and surveillances. There is a shift routine list and folder that the shift foreman uses as a guide. This folder is kept on the CRS's desk. NOs usually do not need any guidance in performing shift routines or shift surveillances given their routine nature. The shift foreman also conducts a pre-job brief, as do the senior lead NOs, before a more detailed or complicated job is undertaken. The pre-job brief may be prescribed by the POD.

### **Vacation 2000**

Vacation 2000 is a database that is available to all employees. It provides upcoming work schedules five weeks in advance so that staff can see who is scheduled for what position and when vacations are scheduled. One NO inputs data, such as vacations requests and whether an employee is volunteering for overtime, for all NOs on the shift.

Vacations are routinely granted if only one NO per shift requests the vacation date. If two NOs request the same date, seniority applies. Only the shift manager can allow more than one NO to have vacation on the same date. Some evidence suggested that NSOs can approve more than one NO to be on vacation at one time. However, that was clarified to state that a shift manager can give a "standing order" during the holidays or some other period to permit NSOs to grant vacation requests for more than one NO, thus making the decision in advance.

Overtime is scheduled by the shift manager five weeks in advance and inputted into the Vacation 2000 database. If overtime is needed on a specific date where it is unscheduled, the shift foreman contacts a clerk who works in the shift manager's office. If that clerk is not available, the shift foreman calls employees based on a voluntary sign-up chart indicating their seniority, and the amount of overtime they have had in the past. This call-in procedure is rudimentary and structured. Ultimately, however, the expectation of the Employer places responsibility for signing off on overtime with the shift manager.

## Analysis

### *Supervisory status*

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be interpreted in the disjunctive and the possession of any one of the authorities listed in that section places the employee invested with this authority in the supervisory class. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied 338 U.S. 899 (1949); *Allen Services Co.*, 314 NLRB 1060, 1061 (1994). However, the Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. *Unifirst Corp.*, 335 NLRB 706, 712-713 (2001); *Asuza Ranch Market*, 321 NLRB 811, 812 (1996). If every minor order made its issuer a supervisor, our industrial composite would be predominantly supervisory. *Providence Hospital*, 320 NLRB 717, 725 (1996), quoting *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967).

To separate straw bosses from true supervisors, the Act prescribes that the exercise of supervisory indicia be in the interest of the employer and require the use of independent judgment. This means that the discharge of Section 2(11) functions in a routine or clerical manner, or the use of independent judgment to solve problems unrelated to Section 2(11) functions, does not qualify as supervisory. *Alois Box Co.*, 326 NLRB 1177 (1998). Further, being vested with the title “supervisor” does not make someone a statutory supervisor. *Carlisle Engineered Products, Inc.*, 330 NLRB 1359, 1360 (2000). Finally, the burden of proof rests with the party seeking to exclude the individual as a supervisor. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001); *Benchmark Mechanical Contractors Inc.*, 327 NLRB 829 (1999).

The Employer does not contend that NSOs lay off, recall, transfer, suspend, or adjust grievances, or that they effectively recommend such action. The Employer however, does contend that NSOs are supervisors by virtue of their authority to assign work, responsibly give direction, evaluate, discipline, discharge, and effectively recommend hiring and promotion.

### ***Assign and Responsibly Direct***

Assignment and direction of employees does not constitute supervisory authority when exercised in a routine manner or circumscribed by management directives. ***Dynamic Science, Inc.***, 334 NLRB 391 (2001); ***Chevron Shipping Co.***, 317 NLRB 379, 381-382 (1995). “The power [must] be exercised with independent judgment rather than in a routine or clerical fashion. This requirement is an expression of Congressional intent to withhold supervisory status from ‘straw bosses’, ‘leadmen’ as well as other low-level employees having modest supervisory authority.” ***Arizona Public Service Co.***, 310 NLRB 477, 480 (1993), quoting ***First Western Building Services, Inc.***, 309 NLRB 591, 599 (1992). In that case, the Board found reactor operators, the equivalent of NSOs, were not supervisors.

In performing their jobs, NSOs follow regimented procedures and a plan for the day. The only instance of NSOs directing other employees occurs where management has allowed flexibility to ensure that activities occur according to switching priorities. The CRNSO directs the activities of the four NOs who do rounds of the four buildings. As described earlier, however, the assignment of work in this capacity is rudimentary, routine and prescribed by NRC guidelines and the Employer’s own written procedures. ***Arizona Public Service Co.***, supra at 480-481.

The assignment of tasks by the shift foreman and patrol NSO to NOs amounts to the NSO keeping operations running smoothly for the Employer. The pre-job brief meetings by the shift foreman is a way for a more experienced employee to show a less experienced employee how to perform a task. The assignment of tasks during abnormal or emergent situations is prescribed by detailed procedures and often involves higher personnel, such as the CRS or shift manager.

Keeping operations running smoothly, such as scheduling breaks for NOs during abnormal conditions, is not enough for finding supervisory status. ***California Beverage Co.***, 283 NLRB 328, 330 (1987). Likewise, instructions given by a more experienced employee to a less experienced employee is not responsible direction of employees. ***First Western Building Services, Inc.***, 309 NLRB 591, 601 (1992). Showing other employees the correct way to perform a task, such as is done in pre-job briefs does not confer supervisory status. ***Franklin Home Health Agency***, 337 NLRB 826, 831 (2002). Also, giving minor orders during the course of a workday does not necessarily make an employee a supervisor. ***Providence Hospital***, 320 NLRB 717, 725 (1996), citing ***NLRB v. Security Guard Service***, 384 F.2d 143, 151 (5th Cir. 1967). The limited authority, if any, of NSOs in assigning task to NOs based on a prescribed POD does not require the use of independent judgment in the direction of other employees. ***Ferguson Electric Co.***, 335 NLRB 142, 147 (2001); ***Bay Area-Los Angeles Express, Inc.***, 275 NLRB 1063, 1075-1076 (1985).

The Employer also asserts that NSOs approve vacations and overtime for NOs. However, the record discloses that vacation requests are approved routinely unless more than one person requests the same day. In that case, seniority applies or the shift manager's approval is needed. As for overtime, the record discloses that the shift manager approves overtime, and the procedure for obtaining employees to work overtime is prescribed by management and the collective bargaining agreement covering NOs. Merely seeking voluntary replacements for absent employees does not constitute supervisory authority. *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548, 552-553 (9th Cir. 1997); *Children's Habilitation Center, Inc. v. NLRB*, 887 F.2d 130, 134 (7th Cir. 1989). In this case, NSOs do nothing more than follow prescribed procedures in the approval of vacations or the scheduling of overtime.

Accordingly, I find NSOs' assignment and direction of employees, to the extent that it exists on this record, to be limited and circumscribed by Employer procedures and routines, and not an exercise of supervisory authority. *Arizona Public Service Co.*, supra; *Dynamic Science, Inc.*, supra.

### ***Evaluations***

Because evaluating is not a statutory indicium of supervisory authority, the Board, with court approval, has consistently declined to find supervisory status based on evaluations, without evidence that they constitute effective recommendations to reward, promote, discipline, or likewise affect the evaluated employee's job status. *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994); *New York University Medical Center v. NLRB*, 156 F.3d 405, 413 (2nd Cir. 1998); *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042, 1046-1047 (8th Cir. 1998).

The record disclosed that NSOs can write observation forms after observing tasks completed by NOs. These forms are not placed in the NO's file and have no bearing on rewards, discipline, pay, or future evaluations. Further, NOs can fill out observations forms on other NOs, and NSOs can do the same for other NSOs. Thus, this form of evaluation does not constitute effective recommendations to affect an employee's job status.

### ***Discipline***

I find that NSOs do not possess the independent authority to discipline or to effectively recommend discipline. As noted earlier, NSOs can issue oral coachings or transform the coaching to an observation form. However, neither action has any consequence or any connection to evaluations, awards, or promotions. See *S.S. Joachim*

*& Anne Residence*, 314 NLRB 1191, 1195 (1994). In fact, the collective bargaining agreement covering NOs specifically states that coachings are not discipline. The NSOs' involvement in such matters is more akin to an administrative function of documenting employee performance without having any real impact on the eventual action to be taken with regard to employee terms and conditions of employment. *Passavant Health Center*, 284 NLRB 887, 889 (1987).

### ***Effective Recommendation of Hire and Promotion***

The authority to evaluate candidates for employment does not establish Section 2(11) supervisory status where the final hiring decision lies elsewhere. *Third Coast Emergency Physicians, P.A.*, 330 NLRB 756, 759 (2000); *Ohio River Co.*, 303 NLRB 696, 718 (1991). In *Third Coast*, emergency room physicians could voluntarily participate in interviewing candidates. They asked questions, filled out recommendation forms, and ranked the candidates. The final hiring decision was then left to the medical directors. In finding that the physicians were not supervisors, the Board held that mere participation in the hiring process where the final decision to hire was retained by the medical directors, was insufficient to establish Section 2(11) supervisory authority. *Supra* at 758.

Likewise in *Ryder Truck Rental, Inc.*, 326 NLRB 1386, 1387 fn. 9 (1998), the purported supervisors sometimes participated in interviewing candidates for employment and offered their opinions or recommendations. However, the hiring official also interviewed the applicants. The Board held that where admitted supervisors participate in the interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring within the meaning of Section 2(11).

In this case, participation by NSOs is voluntary and few current NSOs have participated in these panels. Given the voluntary nature and lack of involvement by almost all of the NSOs in this activity, I cannot find that NSOs have the authority to hire. Additionally, where supervisors, such as the operations manager or shift managers, participate in the interview process, it cannot be said that employees whose status is at issue have authority to effectively recommend hiring within the meaning of Section 2(11). *Id.*

### ***Reward***

The Employer presented some testimonial evidence that NSOs reward NOs through coachings and observations. However, the record disclosed that coachings and observations are not placed in NOs' employment files and have no connection to future evaluations, promotions, or pay.

### ***Secondary Indicia***

The Employer relies on several secondary indicia of supervisory status. In addition to the different uniform, higher pay, and different benefits, the Employer cites invitations to NSOs to attend management meetings, and its contention that NSOs and at least some NOs view NSOs as supervisors. The record contains no descriptions of management meetings and indicates NSOs do not usually attend. As to how NSOs and NOs view NSOs, the Employer refers to applications by NSOs for higher or lateral job positions, and the use of the term “supervisor” in referring to NSOs in certain grievances filed by the Intervenor regarding NSOs performing bargaining unit work. The existence of secondary indicia of supervisory status, such as the possession of title, higher pay, different uniforms, and the like, standing alone, is insufficient to demonstrate supervisory status. *Shen Automotive Dealership Group*, 321 NLRB 586, 594 (1996); *Billows Electric Supply*, 311 NLRB 878 fn. 2 (1993). Secondary indicia of supervisory status is not sufficient to confer supervisory status, where, as here, evidence of primary supervisory authority is absent. *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

Further, the secondary indicia of a disproportionately high ratio of supervisors support my conclusion that NSOs are not supervisors. If NSOs were found to be supervisors, there would be an excessively high ratio of supervisors for the NOs. In fact, if as the Employer asserts, the CRSs and the FSSs, who are above NSOs in the Employer's hierarchy, are supervisors, there would be more supervisors than NOs, approximately 50 to 54 verses 41 to 46, in an operation where job duties are controlled by procedure, and are otherwise routine, and where upper management is present or accessible. See *Airkaman, Inc.*, 230 NLRB 924, 926 (1977). In contrast, if NSOs are not supervisors, the ratio of 26 supervisors for 65 to 72 employees is more reasonable, 1 to 2.5-2.8.

The Employer cites *Wilshire at Lakewood*, 345 NLRB No. 80 (Sept. 30, 2005) among other cases, in support of its position that NSOs are supervisors. There, the Board found that the individual at issue was a supervisor where her duties included checking to see whether employees performed their tasks correctly, correcting employees if they did something wrong, and, at her discretion, documenting infractions on a disciplinary form. A disciplinary write-up would initiate further review by managerial officials, as well as a determination of whether further disciplinary action against the employee was warranted. In addition, the supervisor reported to management on at least two occasions that employees were unfit for work, resulting in adverse action against the employees. She also granted employee requests to leave work early, and performed evaluations of employees which affected their job status.

In contrast, the record in this case fails to establish that NSOs perform the duties described above with the same or similar consequences. NSOs, such as the patrol NSO

and the shift foreman, check to see whether employees are performing their tasks correctly and correct employees if they do something wrong. However, in this regard, NSOs are more similar to a job foreman at a construction site than a supervisor. They provide guidance to NOs as a more senior person with more experience. NSOs may document an incorrect task. However, the documentation does not include the NO's name. Indeed, NSOs are required to write up three observations per month and these observations are given to Phillippon. These observations are used to correct faulty procedures rather than to correct faulty behavior. The observations do not result in further review of the NO's performance or disciplinary action. As discussed, NSOs do not discipline employees, and have never caused adverse action against an NO. Additionally, as also previously discussed, any evaluations of employees do not result in actions that affect job status. Finally, although the Employer proffered that NSOs can allow NOs to leave work early, the record disclosed that NSOs seek the approval of the CRS or shift manager before letting NOs leave work early. Thus, I find the *Wilshire* case inapposite.

## Conclusion

Accordingly, I conclude that none of the NSOs are supervisors within the meaning of Section 2(11) of the Act. They do not reward, lay off, recall, adjust grievances, or effectively recommend such actions. There is insufficient evidence that they exercise independent judgment in their direction or assignment of work to NOs, or that they evaluate, discipline, discharge, or effectively recommend hiring and promotion. See *Arizona Public Service Co.*, 310 NLRB 477 (1993); *Arizona Electrical Power Cooperative*, 250 NLRB 1132 fn. 1, 1136-1137. Having reached that conclusion, I turn to the question of whether the NSOs are an appropriate unit.

In deciding appropriate units, the Board first considers whether the unit sought is appropriate. *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988). A union is not required to seek representation in the most comprehensive or largest unit of employees unless “an appropriate unit compatible with that requested does not exist.” *Overnite Transportation Co.*, 322 NLRB 723 (1996), quoting *P. Ballantine & Sons*, 141 NLRB 1103, 1107 (1963). A primary consideration in determining an appropriate unit is whether there is a significant community of interest between the employees that would require their inclusion in the unit. *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 494 (1985). The Board looks to a variety of factors to determine whether a community of interest exists including, *inter alia*, the degree of functional integration, common supervision, the nature of employee skills and functions, interchangeability and contact among employees, work sites, general working conditions, and fringe benefits. See *The Phoenixian*, 308 NLRB 826, 827-828 (1992); *Home Depot USA, Inc.*, 331 NLRB 1289, 1290-1291 (2000).



In the public utility industry, the Board's long-standing view is that the optimal bargaining unit is one which is system-wide. *New England Telephone & Telegraph Co.*, 280 NLRB 162, 164 (1986). There, the Board noted its earlier statement in *Baltimore Gas & Electric*, 206 NLRB 199, 201 (1973), that the public utility industry "is characterized by a high degree of interdependence of its various segments" and that "the public has an immediate and direct interest" in the maintenance of the essential services that it provides. Thus, particularly to minimize disruptions in essential public services, the Board has been reluctant to fragmentize a utility's operations by finding less than system-wide bargaining units to be appropriate.

However, the Board has found that less than system-wide units may be appropriate when no union seeks a more comprehensive unit and there is no opposing bargaining history. *Deposit Telephone Co.*, 328 NLRB 1029, 1030 (1999) and cases cited. Thus, the Board has been willing to find a less than system-wide unit appropriate where "(1) there is no recent history of bargaining on a system-wide basis; (2) the proposed unit encompasses a distinct administrative or geographical subdivision; (3) the Employer invests substantial autonomy in supervisors at the unit level; and (4) no union seeks to represent employees in a larger unit." *Texas Electric Service Co.*, 261 NLRB 1455, 1458 fn. 13 (1982) and cases cited. In finding a less than system-wide unit appropriate, the Board has also considered whether the employees in the requested unit "enjoy a community of interest sufficient to make separate bargaining a feasible undertaking." *New England Telephone & Telegraph Co.*, 249 NLRB 1166, 1167 (1980).

The Petitioner seeks to represent NSOs as a separate unit. However, I find that there is insufficient evidence in the record to determine if NSOs enjoy a sufficient community of interest to make separate bargaining feasible. I reach that conclusion because there is insufficient evidence as to whether NSOs share a community of interest with the represented employees at Fermi 2 so as to only be appropriately included in that unit, or whether they share a community of interest with the other unrepresented employees at Fermi 2 so as to only be appropriately included in a residual unit of some or all of those employees.

Accordingly, IT IS ORDERED that the hearing is reopened and the case is remanded to the Hearing Officer to take testimony on these issues.<sup>12</sup> The remand will be limited to the following:

1. The terms and conditions of employment for all of the employees currently represented by the Intervenor at Fermi 2.<sup>13</sup>

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<sup>12</sup> Since this is a Decision and Remand, a request for review is premature at this time. Once a final decision is issued, all parties will be given the opportunity to file a request for review regarding both this and the supplemental decision.

<sup>13</sup> This would include all positions held by NOs since some of that information was limited.

2. The terms and conditions of employment for all of the unrepresented employees at Fermi 2.
3. Whether NSOs are an appropriate separate unit.
4. Do NSOs share a community of interest with the represented employees at Fermi 2 so as to only be appropriately included in the existing Fermi 2 unit.
5. Do NSOs share a community of interest with the other unrepresented employees at Fermi 2 so as to only be appropriately included in a residual unit of some or all the unrepresented employees.
6. The parties' positions in items 3 through 5.

Dated at Detroit, Michigan, this 17th day of April, 2006.

(SEAL)

"/s/[Stephen M. Glasser]."

/s/ Stephen M. Glasser

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